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MICHAEL RODAK, JR., CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1977

— 78 - 106
No.
—

ARTHUR C. HANSON,

Petitioner,

vs.

UNITED STATES STEEL CORPORATION,

Respondent.

—
**PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT.**
—

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**PETITION FOR WRIT OF CERTIORARI TO THE
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Petitioner, Arthur C. Hanson, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in the above cause on April 20, 1978.

OPINION BELOW.

The Judgment-Order of the Court below, docketed as case No. 77-1642, is unreported; it is printed in Appendix "A" hereto. The judgment of the District Court was not published, but was orally delivered from the bench in the course of colloquy with counsel at the conclusion of the trial.

JURISDICTION.

The Judgment-Order of the Court of Appeals for the Seventh Circuit was made and entered on April 20, 1978 (Appendix A). The jurisdiction of this Court is invoked under 28 U. S. C. Section 1254(1).

QUESTION PRESENTED.

The question presented is:

Whether termination of an employee between the ages of 40 and 65 in whole or in part because of his lack of "future potential" is inherently discriminatory under the Age Discrimination in Employment Act absent a showing by the Employer of a substantial business necessity for its action.

STATUTE INVOLVED.

This action was brought under the provisions of Section 623(a) of the Age Discrimination in Employment Act (29 U. S. C. Section 623(a)), and is printed in Appendix "B" hereto.¹

STATEMENT OF THE CASE.

Petitioner filed this action under the Act alleging that Respondent unlawfully terminated his employment on April 15, 1975 because of his age, fifty-seven. Respondent countered that Petitioner was not terminated in whole or in part because of his age; but that in the course of an economic cut-back was laid off because he was the least productive of three sales engineers employed in Respondent's Chicago District office.

At trial the following facts were established by uncontroverted evidence:

1. The Age Discrimination in Employment Act will hereinafter be referred to as the "Act."

1. Respondent hired Petitioner in 1965. After having worked in a variety of jobs for Respondent, ranging from sales engineer, District Sales Manager and National Sales Manager of Respondent's Supply Division, Petitioner was told by Respondent on April 15, 1975 that he would be laid off as of May 31, 1975. Respondent has not rehired Petitioner.

2. Respondent regularly reviews the job progress and potential of its employees. The supervisor conducting the review sets out his conclusions in a corporate form entitled "United States Steel Supply Division Management Review Performance and Potential."² Each form requires the reviewer to rate the reviewed employee's "advancement potential" from "above average" to "average" to "improvement indicated." In addition, the form requires a rating of "ultimate corporation potential" for each employee on the following scale:

Unlimited
Exceptional
Limited
No Apparent Potential
Cannot Judge Potential at this time.

On February 6, 1975 Petitioner's review showed that his performance in his "present position" was "acceptable," but that "improvement [was] indicated" in four of five elements affecting his "advancement potential" and that he had no "apparent ultimate corporation potential." See Appendix C. Petitioner's immediate supervisor testified on direct examination that Petitioner was "less able" than the two sales engineers not laid off because of his "lack of potential," among other reasons.

2. See Appendix "C" hereto for an example of such forms admitted into the record at trial.

REASON FOR GRANTING THE WRIT.

The Present Case Raises a Significant Issue Regarding the Administration of the Act Which the Court Should Resolve in the Exercise of Its "General Power to Supervise the Administration of Justice in the Federal Courts." Western Pacific Ry. Corp. v. Western Pacific RR., 345 U. S. 247, 260.

In *Morelock v. N. C. R. Corp.*, 546 F. 2d 682 (6th Cir. 1976), the court noted that the Act is "an offspring of the Civil Rights Act of 1964. [T]he express purpose of the Act is to promote the 'employment of older persons based on their ability rather than age' and to prohibit 'arbitrary age discrimination.' The prohibitions of the ADEA are on terms virtually identical to those of Title VII of the Civil Rights Act of 1964, except that 'age' has been substituted for 'race, color, religion, sex or national origin.'" The "similarities between Title VII and the ADEA are 'hardly accidental,' and although it may be inappropriate to simply borrow and apply the standards of Title VII to the ADEA automatically, an analogous application of such standards should not be disregarded." *Id.* Accord: *Hodgson v. First Federal Savings and Loan Association*, 455 F. 2d 818 (5th Cir. 1972); *Laugesen v. Anaconda Co.*, 510 F. 2d 307 (6th Cir. 1975).

In *Griggs v. Duke Power Co.*, 401 U. S. 424, 431 (1971), this Court established the principle that Title VII—

... proscribes not only overt discrimination but also practices that are fair in form but discriminatory in operation. The touchstone is business necessity. If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited.

The rule that an action or policy discriminatory in effect, if not in design, is unlawful under Title VII unless based on substantial business necessity has, of course, been applied in

a great variety of factual settings. See e.g., *Gregory v. Litton Systems, Inc.*, 472 F. 2d 631 (9th Cir. 1972) (Hiring decision based on arrest record discriminates against Negroes); *U. S. v. Georgia Power Co.*, 474 F. 2d 906 (5th Cir. 1973) (Unvalidated aptitude test is discriminatory); *U. S. v. Bethlehem Steel Corp.*, 446 F. 2d 652 (2d Cir. 1971) (Present effects of past discrimination are remediable); *Robinson v. Lorillard Corp.*, 444 F. 2d 791 (4th Cir. 1971) (Seniority system which freezes Negro employees out of jobs unlawfully withheld prior to enactment of Title VII is unlawful); *Green v. Missouri Pacific RR*, 523 F. 2d 1290 (8th Cir. 1975), (Use of arrest records unlawfully discriminates against Negro job applicants); *Rowe v. General Motors Corp.*, 457 F. 2d 348 (5th Cir. 1972) (Promotion based upon subjective recommendation of white foreman freezes past discrimination and is unlawful); *Kaplan v. IATSE*, 525 F. 2d 1354 (9th Cir. 1975) (Seniority system discriminated against women).

Review of the decision below is required to decide whether denial of employment opportunity to a protected employee because of his limited employment potential or job future is permitted. Determination of the test to be established for "an analogous application of standards" is especially important in light of the clear likelihood of abuse resulting from application of the current *de facto* test of "future potential" to protected employees who because of their age have a less expansive future than unprotected employees.

As the average age of the work force increases, the likelihood of widespread abuse of a test of permitted "future potential" grows apace; and this test will carry with it the probability of pervasive and duplicitous discrimination against the middle-aged and elderly worker thought protected by the Act.

Griggs v. Duke Power Company prohibited application of irrelevant employment standards that had the effect of severely limiting the job market for and the job opportunities of Negroes and other minorities, and it thus prevented widespread employer

avoidance of Title VII. This case provides a similar opportunity for this Court to clarify the circumstances under which an employer may, if at all, limit the employment opportunities of a protected employee because of his limited job "future." A 60-year old employee has less future employment opportunity than a 30-year old employee; and resolution of the issue of whether an employer may decide that this limited "future" also limits employment opportunities is of major significance to millions of employees covered by the Act.

CONCLUSION.

WHEREFORE, for the foregoing reasons Petitioner respectfully requests that this Court grant its Writ of Certiorari in this matter.

Respectfully submitted,

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APPENDIX "A".

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

Heard January 13, 1978

April 20, 1978

Before

HON. WALTER J. CUMMINGS, *Circuit Judge*
HON. WILBUR F. PELL, JR., *Circuit Judge*
HON. WILLIAM G. EAST, *Senior District Judge**

ARTHUR C. HANSON,
Plaintiff-Appellant,

No. 77-1642 vs.

UNITED STATES STEEL CORPORATION,
Defendant-Appellee.

Appeal from the
United States Dis-
trict Court for the
Northern District of
Illinois, Eastern Di-
vision.

No. 76 C 1909
Thomas R. McMillen,
Judge.

ORDER

In his complaint herein, plaintiff claimed that defendant had violated the Age Discrimination in Employment Act (29 U. S. C. §§ 621-634) by terminating his employment April 15,

* Senior District Judge William G. East of the District of Oregon is sitting by designation.

1975, when he was 57 years of age. He sought compensatory damages of \$1,130,471 and \$500,000 punitive damages, plus costs and attorneys' fees. In its answer, defendant asserted that plaintiff was terminated "because of the need to reduce forces due to poor business conditions." After a two-day bench trial, the district court found in favor of the defendant and judgment was so entered. On appeal, plaintiff argues that a preponderance of the evidence established that his employment was terminated in violation of the Act. We disagree and therefore affirm.

The undisputed evidence shows that in 1969 plaintiff was promoted to the position of National Accounts Manager in charge of all of defendant's rebar sales activities. Rebars are concrete reinforcing bar products. In 1970, he was demoted to Rebar Sales Manager in the Chicago, Illinois, district; and in April 1974, he was apparently demoted to the position of Sales Engineer in the Chicago district. On April 15, 1975, when one of the three Sales Engineers' positions in the Chicago district was eliminated, he was laid off as of May 31, 1975, and has not been recalled to work.

In early 1975, Earl Simanek, president of the defendant's Supply Division, decided to reduce rebar operations in the Chicago district by decreasing production from 5,000 tons to 2,000 tons per month and confining sales efforts to those jobs done by large contractors. On April 8, 1975, he ordered John P. Long, defendant's Chicago district manager, and Stewart Bashian, then defendant's General Manager of Rebars, as part of the reorganization plan for restructuring the Chicago rebar operations, to provide for the elimination of one of the three Sales Engineer positions. At that time, the incumbent Sales Engineers were plaintiff, John Jongsma and Tom Shaughnessy, both in their 40's and with ten years' more service with defendant than plaintiff. From March 27, 1974, through April 16, 1975, the three Sales Engineers made the following sales (App. 72-78):

Hanson	2312	tons
Jongsma	2964.7	tons (or 2821.5 tons according to plaintiff)
Shaughnessy	4737	tons (or 4851 tons according to plaintiff)

Pursuant to the decision to eliminate one of the three Sales Engineers' positions, on April 8th, Long, with the concurrence of Simanek and Bashian, decided to place Hanson on layoff based on several considerations, including his relatively poor sales performance, his comparative inability to estimate the amount of rebars required by a complex construction job, his poor commercial judgment, his failure to win the respect of customers, and his lack of future potential. On April 15th Long and Bashian told plaintiff he was being laid off effective May 15th.

While plaintiff testified that Bashian warned him from December 1973 until April 15, 1975, that plaintiff's job was in danger because of his age and that Long told plaintiff that defendant decided to go with the younger men (Messrs. Jongsma and Shaughnessy), Bashian denied such statements and Long testified that plaintiff was not told on April 15th that he was selected for layoff because of his age.

Disregarding Rule 52(a) of the Federal Rules of Civil Procedure, the district judge's findings of fact and conclusions of law appear only in his statements from the bench during trial. It would have been much preferable if formal findings of fact and conclusions of law had been adopted or if they had appeared in an opinion or memorandum of the decision. However, the parties submit that the judge's findings of fact and conclusions of law may be culled from his trial remarks, and they do not predicate error upon the absence of formal findings of fact and conclusions of law. Therefore, we have turned to the transcript as reprinted in the Appendix (A) and Supplemental Appendix (S. A.) to glean the district judge's position.

The court first found that plaintiff was discharged or laid off "because there was a reduction in the amount of business that was going to be handled by the company," so that one of the three Sales Engineers had to be laid off (A. 63).

The court also found that any reference to plaintiff's age by Mr. Bashian¹ occurred before the company decided to reduce production of its portion of the rebar market in March 1975.² Bashian was found not to have referred to plaintiff's age at the April 8, 1975, termination decision meeting, or even at the March 1975 meeting with respect to reorganization (A. 64-65). The judge found that the ultimate decision to lay off Hanson was made on April 8th by Chicago district manager Long (A. 65), although concurred in by Bashian and Steel Supply Division president Simanek (A. 70). He determined that Bashian was not trying to get rid of plaintiff because of his age (A. 65a). The court found that one factor in retaining Messrs. Jongsma and Shaughnessy instead of plaintiff was because they had more seniority (A. 66) and that Messrs. Simanek, Long and Bashian did not decide that plaintiff was "slipping because of age" (A. 66-67). Despite any alleged statement by Long referring to two younger employees, the court found that the decision to keep Jongsma and Shaughnessy was because they were greater in seniority, productivity, and ability to sell the goods (A. 68); any statement to the contrary was "merely a statement of what happened and not the reason why it hap-

1. Plaintiff's emphasis on Bashian's personal hostility undermines his claim of age discrimination. *Mastie v. Great Lakes Steel Corp.*, 424 F. Supp. 1299, 1312 (E. D. Mich. 1976). Bashian's failure to produce plaintiff's exhibit Z was not prejudicial to plaintiff because he found it on his own and it was received in evidence. While plaintiff claims Bashian's failure to find the document initially should cast doubt on his credibility, all the testimony on this issue was introduced before the district judge who credited Bashian's testimony (A. 70-71; S. A. 88).

2. Despite plaintiff's contrary assertion that Bashian's critical phone calls to plaintiff occurred until April 15 (Br. 19), the evidence does not so show (A. 50-51) and the court found that the credited phone calls were prior to the decision to reduce the force (A. 67).

pened" (A. 68). From the evidence, the court found that [on April 8th] Simanek, Long and Bashian decided to lay off plaintiff because he was the least efficient producer of the three Sales Engineers (A. 70).³

Although the court found that plaintiff had made out a *prima facie* case through his testimony, the defendant's testimony convinced the court that plaintiff was laid off on April 15th on the basis of merit, productivity and performance and that age was not a factor in the layoff (A. 71, S. A. 88).

The court's conclusions of law recognized that there is a fine line between future potential and cause of layoff because of age (A. 62-63). Plaintiff argues that his layoff violated the Act as a matter of law because it was based in part on his relative lack of "future potential." He asserts that any consideration of future potential of necessity involves discrimination against older employees. While the evaluation of future potential might in a later case raise difficult line-drawing problems and present an important question in the interpretation of the Act, those problems are not raised here because, as defendant explained and plaintiff did not rebut the "future potential" factor used by defendant considered only whether an employee's abilities make him a candidate for a promotion. The forms involved ask for "ultimate corporation potential" and do not inquire into longevity. Such an evaluation of an employee's ability to perform a more responsible job is not, of course, an improper decision-making criterion under the Act. Cf. *Stringfellow v. Monsanto Co.*, 320 F. Supp. 1175 (W. D. Ark., 1970).

The court stated that a legitimate basis for this layoff was that plaintiff had less time to give, was not quite as good a salesman nor quite as good an estimator (A. 64). It was legitimate for the company to consider that because of longer seniority, Messrs. Jongsma and Shaughnessy were entitled to preferential treatment (A. 66). Plaintiff's *prima facie* case was overcome by

3. In a February 1975 evaluation report, Bashian had given plaintiff a poor performance rating adding that he had no advancement potential (S. A. 1-4).

defendant's evidence because its witnesses satisfied the trier of facts that plaintiff's age was not a factor in his layoff.⁴ As to plaintiff's credibility, Judge McMillen determined his testimony was not entirely convincing and was mistaken insofar as he believed that he was discriminated against because of age. The ultimate conclusion of law, of course, was that defendant had not violated the Age Discrimination in Employment Act (S. A. 88).

Our review of the findings of fact and conclusions of law derived from the trial transcript satisfies us that the findings were not clearly erroneous, nor that there was a misconception of the statute. Therefore, the judgment is affirmed.

APPENDIX "B".

§ 623. Prohibition of Age Discrimination.

(a) **Employer practices.** It shall be unlawful for an employer—

- (1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;
- (2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age; or
- (3) to reduce the wage rate of any employee in order to comply with this Act [29 USCS §§ 621-634].

4. This was the correct standard to apply. See *Morelock v. NCR Corp.*, 546 F. 2d 682, 686 (6th Cir. 1976); *Smith v. Sol D. Adler Realty Co.*, 436 F. 2d 344, 349-350 (7th Cir. 1971).

APPENDIX "C"

United States Steel Supply Division

MANAGEMENT REVIEW PERFORMANCE AND POTENTIAL

Employee's Name	<u>ARTHUR C. HANSON</u>	Dist. or Dept.	<u>USD CHICAGO-REBAR DEPT.</u>
Position	<u>SALES ENGINEER</u>	Continuous Service Date	<u>2/1/65</u>
Date Assigned		Birth Date	<u>3/15/18</u>
Present Position			

This review is designed for the annual appraisal of current management employees' performance and to identify candidates for advanced positions in management. Use it to identify the employee's strengths and deficiencies, and to outline a plan for his future development. Be factual and honest, because Management Reviews are used for reference when position opportunities become available.

HOW TO CONDUCT THE REVIEW

- Before talking with the employee, brief yourself on his employment history, length of service, positions held and his general progress. A review of his position description will refresh you on the scope of his responsibilities and provide an opportunity to make sure the description is up-to-date.
- Complete the section of the review that represents your judgment of his Performance and Potential.
- Decide what aspects of his performance you should discuss during the interview. Each employee deserves an individual approach. Plan on covering one or two of the more important areas. You may wish to discuss your plans for the interview with your supervisor.
- Hold your review where there will be no interruptions and where you won't be overheard, and pick a time when you will not be disturbed.
- Make it conversational and gear it to the individual. Remember, "to listen is to learn".
- After acquainting the employee with the purpose of the discussion, encourage him to talk freely about himself, his job, personal problems, his aspirations for the future, etc. Direct the conversation, when necessary, to cover the points you planned to discuss.
- Compliment him on his strengths. Tell him whether you are satisfied with his performance and what you expect of him. Also discuss those aspects of his performance which can be improved -- by his own actions and/or with your help. Set target date for improvement review.
- Complete the rest of the Review form based on the interview.
- If you wish to retain a copy of the Review, make a duplicate for your confidential files.

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PHOTO

Year Taken: _____

EDUCATION

Highest Degree: (College or University)

Degree _____

College or Univ. _____

UNIVERSITY OF MINNESOTA (ONE YEAR)

Location: (State) _____

MINNESOTA

Year Graduated _____

Course of Study _____

BUSINESS

(Major or Department)

If no college or university degree, describe academic background, highest level achieved, etc.

Describe post-graduate work, if any: _____

If currently engaged in any business-oriented educational activity, please describe briefly: _____

MAJOR BUSINESS EXPERIENCE

USS, USD and other, if applicable

2/1/65	-	9/30/65	USD PCH REBAR	SALES ENGINEER I
10/1/65	-	5/31/68	" " "	MANAGER-REBAR SALES
6/1/68	-	6/15/69	USD DETROIT REBAR	MANAGER-REBAR SALES
6/16/69	-	5/31/70	USD G.O. COMMERCIAL	MANAGER-CONCRETE REINF. PRODUCTS
6/1/70	-	3/31/74	USD CHICAGO REBAR	MANAGER-REBAR SALES
4/1/74			" " "	SALES ENGINEER

RELOCATION LIMITATIONS

☐

No limitations

☐

Has limitations. Explain: _____

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PERFORMANCE - PRESENT POSITION

Consider performance during the past twelve months or since assigned to present position, if less than twelve months.

- ☐ A _____ OUTSTANDING - far exceeds position requirements and objectives
- ☐ B _____ VERY GOOD - exceeds position requirements and objectives
- ☐ C y _____ ACCEPTABLE - meets position requirements and objectives
- ☐ D _____ MARGINAL - does not meet position requirements and objectives.
Situation correctable.
- ☐ F _____ FAILING - situation beyond correcting. Demote or separate.
- ☐ X _____ CANNOT JUDGE AT THIS TIME. Reason: _____

COMMENTS ON PERFORMANCE RATING: Briefly indicate accomplishments, strengths and weaknesses on present position. TENDS TO DISTORT AND/OR EXAGGERATE COMMERCIAL SITUATION OR MARKET CONDITION. LACKS CUSTOMER FOLLOWING AND REALISTIC JUDGMENT. DOES A FAIRLY GOOD JOB WHEN UNDER VERY STRICT CONTROL - ON A SHORT LEASH. CLOSE DIRECTION NECESSARY.

ACTION: Indicate planned action to overcome weaknesses and results of planned action if implemented as a result of a prior appraisal. _____

Has this performance evaluation been discussed with employee?

YES ☒

DATE 1/24/75

REACTION _____

• NO ☐

REASON _____

ADVANCEMENT POTENTIAL

ELEMENTS AFFECTING POTENTIAL:

Leadership - Ability to work with and direct fellow employees (vertically and laterally)

Above
Average

Average

Improvement
Indicated

X

Ability to communicate (vertically and laterally)

X

• Total Productivity including creativeness

X

MBO Performance (personally and vertically)

X

General Health (consider stamina)

X

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ENTIAL

- ☐ UNLIMITED - has demonstrated ability to progress to highest Division and/or USS levels - USD or USS executive.
- ☐ EXCEPTIONAL - has demonstrated ability to progress to top USD District or Area levels; USD Headquarters Staff; USS comparable position.
- ☐ LIMITED - ability to progress no more than one step (next highest position or one of comparable level in USD or USS).
- ☒ NO APPARENT POTENTIAL - full utilization of abilities on present assignment, etc.
- ☐ CANNOT JUDGE POTENTIAL AT THIS TIME - due to newness on position, etc.

Based upon the advancement potential indicated herein, what specific action or activities are you planning in order to develop this candidate properly? (Special assignments, outside activities, additional education, etc.)

To what ultimate position does this employee aspire? HAPPY IN HIS PRESENT POSITION

Do you think this is realistic? ☐ YES ☐ NO Why?

Considering your appraisal, confidentially - what is the next highest position for which you would recommend him? NONE - PRESENT POSITION ONLY

Signature _____ Title _____ Date _____
Prepared by:
Employee's immediate Supervisor

Comments: _____

Reviewed by:
Appraiser's Supervisor

Comments: _____

Reviewed by:
District Manager

Comments: _____

Reviewed by:
Area General Manager/General
Office Department Head

MANAGER-CONCRETE REINFORCING
PRODUCTS

2/6/73